Healthcare Providers Should Have Patients Execute Powers of Attorney

by Michael F. Fried

Consider this scenario: Steve was the life of last year's holiday party—until he tore his medial meniscus executing what he later allowed was perhaps an unwise dance move. Fortunately, Steve knew of an excellent New Jersey-based orthopedic practice. It was not in-network with his employer's Employee Retirement Income Security Act (ERISA)-governed health insurance, but the policy had out-of-network benefits. So Steve hobbled into the practice, filled out its patient forms, and eventually underwent successful surgery. The practice timely submitted to the insurer a claim for its services—and was paid less than five percent of its billed amount. Next, the practice exhausted the policy's internal appeals process by twice appealing the meager reimbursement amount, and twice being denied. Finally, the practice sued the insurance company for greater reimbursement.

The insurer moved to dismiss the complaint on the basis that the practice did not have standing to sue—the claim for benefits, it argued, belonged to Steve, and he was not a party to the lawsuit. The practice responded that Steve had signed an assignment of benefits that was included with its standard patient forms, and that the assignment provided the practice with the standing it needed. But the insurer argued that Steve could not assign his benefits because—unbeknownst to Steve—the policy had an anti-assignment clause that the insurer claimed rendered the assignment a legal nullity.

If the trial court agreed, the orthopedic practice would not 'own' the claim for benefits, and so it would not have standing to sue for those benefits. The case would be dismissed, and the practice would be out of luck. Would the trial court find that the anti-assignment clause was valid?

Of course, many factors could affect the court's decision, but a significant factor is the Third Circuit Court of Appeals' May 16, 2018, decision in *Am. Orthopedic & Sports Med. v. Indep. Blue Cross Blue Shield*.[1] In that case, the Third Circuit held that "anti-assignment clauses in ERISA-governed health insurance plans as a general matter are enforceable."[2] So, the anti-assignment clause would probably be enforceable, although the court qualified its holding with, "as a general matter."

So is that it? Medical providers likely cannot bring legal actions to enforce their rights to payment under their patients' health insurance plans? No, medical providers very much can still bring those legal actions under various legal theories. While the Third Circuit has held that anti-assignment clauses are generally enforceable, they are not always legally bulletproof. The Third Circuit also made clear that providers have another tool they can use—powers of attorney. While an assignment transfers ownership of a claim to a medical provider, a power of attorney confers upon a provider the power to act on the patient's behalf. Anti-assignment clauses have no effect on powers of attorney. As Judge Cheryl Anne Krause wrote for the Third Circuit, "the anti-assignment clause no more has power to strip [the medical practice] of its ability to act as [the patient's] agent than it does to strip [the patient] of his own interest in his claim."[3] Judge Krause noted that powers of attorney are already in widespread use when people seek medical treatment and anticipate being incapacitated.[4]

Counsel to healthcare providers should lose no time in reviewing their clients' patient forms to make sure they include a power of attorney—before their clients provide services that may lead to litigation with a health insurer due to low or non-reimbursement.

After all, Steve, Mr. Accident-Waiting-To-Happen, is fresh out of post-surgical physical therapy and already talking about how he is "going to be absolutely amazing" at the high-impact aerobics class that he just joined. ■

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Endnotes

1. 890 F.3d 445 (3d Cir. 2018).
2. *Id*. at 45.
3. *Id*. at 455.
4. *Id*.